United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1678

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P/S

To be argued by
JAMES E. NESLAND

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1678

UNITED STATES OF AMERICA,

Appellee,

—against—

JEROME E. SILVERMAN, PHILIP ZANE, and ROBERT S. PERSKY,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
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Preliminary Statement

Philip Zane, Jerome E. Silverman and Robert S. Persky appeal from an order entered April 26, 1974, in the United States District Court for the Southern District of New York by the Honorable Inzer B. Wyatt, United States District Judge, denying their motion for a new trial, made pursuant to Rule 33 of the Federal Rules of Criminal Procedure.

On June 13, 1973, after a five week trial before Judge Wyatt and a jury, appellants were each convicted on Count Two of Indictment 73 Cr. 192, which charged them with filing a false annual report (Form 10K) for Microthermal Applications, Inc., with the Securities and Exchange Commission, in violation of Title 15, United States Code, Sections 78o and 78ff, 17 C.F.R. §§ 240.15d-1 and 240.12b-20, and Title 18, United States Code, Section 2. Each of appellants was sentenced to two years imprisonment, four months to be served and the balance suspended, to be followed by

two years probation. The convictions were affirmed by this Court on April 1, 1974. *United States* v. *Zane*, 495 F.2d 683 (2d Cir.), *petitions for cert. filed*, Dkt. Nos. 73-1878, 1901 (June 14 and 20, 1974).

On April 11, 1974, appellants filed motions for a new trial based exclusively upon evidence that, subsequent to their trial, Akiyoshi Yamada, a witness for the Government at the trial, had been charged and subsequently convicted on Indictment 74 Cr. 100.* On April 26, 1974, Judge Wyatt denied the motions for a new trial, holding in an oral opinion that Yamada's recent conviction for a crime committed after appellants' trial was merely cumulative evidence of an impeaching nature (Transcript of April 25, 1974, pp. 35-37).

ARGUMENT

Judge Wyatt properly denied appellants' motions for a new trial.

Zane, Silverman and Persky contend that Judge Wyatt abused his discretion in denying their new trial motions based on Yamada's conviction for mail fraud after their trial. Their contention is without merit.

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* The indictment, filed January 31, 1974, in 16 counts, essentially charged Yamada with endeavoring to defraud the United States District Court for the Southern District of New York by submitting five fictitious letters to the Honorable Irving Ben Cooper, United States District Judge, in July 1973, in an effort to improperly influence Judge Cooper's decision on a motion then pending to reduce the two-year sentence of imprisonment previously imposed upon Yamada on pleas of guilty to Indictment 73 Cr. 363, Information 73 Cr. 426, and Information 73 Cr. 427. On April 15, 1974, Yamada entered a plea of guilty to Count Six and Counts Twelve through Sixteen. He was sentenced by Judge Lasker on May 20, 1974, to a term of imprisonment of one year, to run consecutively to his earlier sentence of two years imprisonment.

"The generally accepted criteria for granting a new trial on the ground of newly discovered evidence are (1) the evidence must have been discovered since the trial, (2) it must be material to the factual issues at the trial and not merely cumulative of evidence already introduced or impeaching the character or credit of a witness, and (3) it must be of such a nature that it would probably produce a different verdict in the event of a retrial. *United States* v. *Polisi*, 416 F.2d 573, 576-577 (2d Cir. 1969)." *United States* v. *DeSapio*, 456 F.2d 644, 647 (2d Cir.), *cert. denied*, 406 U.S. 933 (1972). See also *United States* v. *Kahn*, 472 F.2d 272, 287 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973).* "A motion for a new trial based on newly discovered evidence is addressed to the discretion of the trial court. *United States* v. *Silverman*, 430 F.2d 106, 119 (2d Cir. 1970), [*cert. denied*, 402 U.S. 951 (1971)]; *United States* v. *Lombardozzi*, 343 F.2d 127, 128 (2d Cir.), *cert. denied*, 381 U.S. 938 (1965); *Brown* v. *United States*, 333 F.2d 723, 724 (2d Cir. 1964). It is 'not favored and should be granted only with great caution,' *United States* v. *Costello*, 255 F.2d 876, 879 (2d Cir.), *cert. denied*, 357 U.S. 937 (1958). . ." *United States* v. *Sposato*, 446 F.2d 779, 781 (2d Cir. 1971). Under these standards it is abundantly clear that Judge Wyatt did not abuse his discretion in denying the new trial motions, holding:

> "But I still believe that since his credibility, as the Court of Appeals said, was thoroughly explored: the jury had before it the various felony charges that had been made against Yamada, the pleas of guilty, his perjury before the SEC, his hopes of leniency and they were dealt with not only in his testimony but

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* *Kahn* goes on to discuss the well-settled exceptions to this rule in situations in which the newly discovered evidence was known to the prosecution at the time of trial but not disclosed to the defense. Appellants do not claim, nor could they, that the fraud which Yamada attempted to perpetrate on Judge Cooper after their trial was known to the Government prior to or during their trial.

in summation, and I remember in my charge I gave—I have to say 'standard' instructions, but I do have a usual formulation as to accomplice testimony and to testimony of those with prior criminal convictions, and I did call to the attention of the jury the fact that Yamada was an accomplice, that he had criminal records.

I know that I also said that he was an admitted perjurer; I think I may have done that at the request of one or more of the defendants. I told the jury that the testimony of accomplices and of those with criminal convictions and of those who admitted perjury should be viewed with great caution and scrutinized carefully, so I certainly impressed it on the jury what they had to do in weighing Yamada's testimony.

Therefore, it seems to me despite able presentations this afternoon, what he did before Judge Cooper, which seems not only fraudulent but foolish, but still, whatever it is, it seems to me to be cumulative on impeaching his credibility" (Transcript of April 25, 1974, pp. 36-37).

In the first place, it is obvious that evidence that Yamada attempted to secure a reduction in his sentence by fraud is in no way related to the factual issue before the jury in the trial of Silverman, Zane and Persky, which was whether they, along with others, had participated criminally in the filing of a false report with the Securities and Exchange Commission. While, to be sure, evidence of Yamada's further criminal activities after the trial of this case would contradict the impression he gave at the trial that he had abandoned his life of crime and had reformed (an impression that doubtless accurately reflected his state of mind at the time), it is nonetheless clear that this evidence would merely impeach his credibility generally and would not in any way contradict any of his testimony at trial implicating Silverman, Zane and Persky. *United States* v. *Sposato, supra,* 446 F.2d at 782; *United States* v. *Aguillar,* 387 F.2d 625, 626 (2d Cir.

1967); *United States* v. *Switzer*, 252 F.2d 139, 145-146 (2d Cir. 1958); *United States* v. *Brewster*, 231 F.2d 213, 215-216 (2d Cir. 1956).

Second, as this Court noted in its opinion affirming the convictions in this case, "In the five-week trial, marked by extensive cross-examination of Yamada, his credibility was thoroughly explored by counsel of recognized competence." 495 F.2d at 696. In the course of direct and lengthy cross-examination, Yamada was questioned and testified in detail about crimes he had committed. He testified that he had participated in a variety of fraudulent schemes and manipulations of securities, involving Lady Goldie Bracelets, Seijo Associates, Armstrong Investors, Devon International, Ltd., Galco Leasing Corp., Hair Extension Center, Inc., Health Evaluation Systems, Inc., Competitive Associates, Takara Partners, Visual Sciences, Inc., Coatings Unlimited, Science Systems & Technology (SST), M & H Studios, Inc., Academic Systems and of course, Microthermal Applications, Inc. In addition, Yamada admitted that he collected and destroyed documents and gave perjurious testimony for several days before the Securities and Exchange Commission during its investigation into these matters. Yamada testified that as a result of an understanding reached with the United States Attorney's Office, he was permitted to plead guilty to three one-count indictments, one of which charged him with the conspiracy to file a false annual report for Microthermal, and that the Government had agreed not to proceed against him on the other criminal offenses in return for his cooperation (Trial [hereafter "T."] Tr. 1573-1613).* Conse-

* Counsel for Zane and Silverman elicited other admissions from Yamada concerning his arrangement with the Government: that, without the limitation on his criminal liability, the possible sentence for his many crimes exceeded his life time; that, as part of his understanding with the Government, the Government would advise the Court of his cooperation at the time of sentencing and that he was aware that Galanis had re-

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quently, quite apart from the fact that the newly discovered evidence is merely impeaching, it is also insufficient to warrant the granting of a new trial because it is merely cumulative of the other evidence before the jury about the unsavoriness of Yamada's character and his self-interest in testifying. See *United States* v. *DePalma*, 461 F.2d 240 (9th Cir. 1972); *United States* v. *Stephenson*, 448 F.2d 768 (5th Cir.), *cert. denied*, 405 U.S. 1069 (1971).

Third, implicit in Judge Wyatt's holding that the newly discovered evidence is cumulative and impeaching and in his denial of the motions for a new trial is the conclusion that evidence of Yamada's post-trial conviction would not ". . . probably produce a different verdict in the event of a retrial." *United States* v. *DeSapio, supra*, 456 F.2d at 647. Zane and Silverman argue that this evidence is significant because Yamada's fraud in connection with his sentence occurred after his cooperation with the Government began and after, according to his testimony at their trial, he turned over a new leaf. However, while this new evidence would provide appellants with some additional ammunition for cross-examination,* and while it may suggest that the impression that Yamada gave at trial about his rehabilitation turned out to be inaccurate,** it can hardly be said to be a suffi-

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ceived a six-month prison sentence after the Government advised the trial court of his cooperation. Thus, contrary to the thrust of appellants' arguments, the jury was amply made aware of the possible motivations, including a desire for leniency, that Yamada had for testifying at trial.

* Appellants refer to the sentencing memorandum the Government submitted to Judge Lasker dealing with Yamada's latest conviction to bolster their position regarding the value of the conviction were a new trial awarded. The memorandum simply states the obvious. Yamada's latest conviction, while a cooperating witness, naturally reduces his usefulness as a witness for the Government since it provides additional new impeaching evidence.

** There is, however, no showing whatever made that Yamada's trial testimony about his having reformed did not accurately express his existing aspirations, even though these later crumbled in the face of a two-year jail term.

cient basis on which to find that the jury would probably have reached a different verdict had it been aware of Yamada's post-trial crime. Compare *United States* v. *Marquez*, 363 F. Supp. 802 (S.D.N.Y. 1973) (Weinfeld, *J.*), *aff'd on the opinion below*, 490 F.2d 1383 (2d Cir. 1974). See also *United States* v. *Kahn*, *supra*, 472 F.2d at 289. Yamada's credibility was subjected to a scathing cross-examination at trial based on substantial impeaching evidence of his other crimes, and his testimony was both corroborated by and of secondary value to that of John Galanis and Steven Burns,* whose testimony attributed actual knowledge to appellants concerning the lack of $480,000 in certificates of deposit when the Microthermal annual report was prepared and filed with the Securites and Exchange Commission.**

Appellants seek to upset Judge Wyatt's decision by claiming that their case is akin to *Mesarosh* v. *United States*, 352

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* It should be noted that the instances of Yamada's testimony concerning Zane and Silverman, recited in their brief, pages 4 and 5, fail to indicate that Yamada was merely giving hearsay testimony which, in all but one instance, related to conversations with others who testified at trial subject to cross-examination by appellants. Yamada testified that Kaplan (who did not testify) told him that different accountants were required because Arthur Anderson would not certify the financial statement (T. Tr. 1553); he testified that Galanis (who testified) told him that Burns (who also testified) would provide two cooperative accountants, Zane and Silverman, who Burns had in his "hip pocket", for the audit (T. Tr. 1553-61); he testified that Galanis told him that Zane and Silverman would be satisfied with a letter from a bank; and he testified (as did Galanis and Burns) that Zane and Silverman were present at the Rozzo meeting where Yamada saw the first Franklin National Bank letter (T. Tr. 1563-71). Elsewhere in testimony which is not cited, Yamada testified that he did not recall Zane and Silverman saying anything at the Rozzo meeting about the Franklin National Bank letter (T. Tr. 1621).

** In both *United States* v. *Sposato* and *United States* v. *Aguillar*, *supra*, the witnesses were not only unimpeached Government agents but their testimony was indispensible to the defendants' convictions.

U.S. 1 (1956). Their reliance upon *Mesarosh* is misplaced. In *Mesarosh,* the petitioners stood convicted of violating the Smith Act. One of the witnesses who testified concerning petitioners' Communist activities at the trial had been an informant named Joseph D. Mazzei. While the case was pending before the Supreme Court after *certiorari* had been granted, the Solicitor General moved to remand the case to the trial court, disclosing that, within a couple of months following petitioners' trial and continuously thereafter, Mazzei had given false testimony in several proceedings concerning purported subversive activities Mazzei attributed to persons he identified as members of the Communist party. Finding the content of the trial testimony and the subsequent tainted testimony substantially alike, the Court held that the latter false testimony provided more than merely cumulative or impeaching evidence and granted the petitioners a new trial.

The obvious distinction between the situation here and that in *Mesarosh* is that Mazzei's subsequent false testimony regarding alleged Communist activities paralleled his substantive trial testimony about the same subject matter in *Mesarosh,* testimony that went directly to the purported guilt of the *Mesarosh* defendants. On the other hand, Yamada's conviction for submitting fictitious letters to Judge Cooper is in no way "material to the factual issues at the trial" in this case, *United States* v. *Kahn, supra,* 472 F.2d at 287, *United States* v. *DeSapio, supra,* 456 F.2d at 647, and hardly undermines his trial testimony concerning the filing of Microthermal's false annual report. Rather, it provides merely another incident of collateral criminal misconduct by Yamada, the value of which is limited to impeachment of his credibility generally.*

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* *United States* v. *Chisum,* 436 F.2d 645 (9th Cir. 1971), upon which appellants also rely, is similarly inapposite. In that

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CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

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case, the defendant was convicted on the testimony of a federal narcotics agent who was subsequently indicted for making false statements, perjury and suborning perjury in his efforts to "frame" another defendant at a trial contemporaneous with Chisum's. In *Chisum*, as in *Mesarosh*, the newly discovered evidence, far from merely impeaching credibility generally, strongly suggested that key Government witnesses had "framed" the defendants and thus bore directly on the central factual issues at trial and the defendants' guilt, hardly the situation here. As this Court has held, relying on *Mesarosh*, "The discovery of new evidence which merely discredits a government's witness and does not directly contradict the Government's case ordinarily does not justify the grant of a new trial." *United States* v. *Aguillar*, *supra*, 387 F.2d at 626.

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John D. Gordan III

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